

**The Bakersfield Californian, Employer-Petitioner and Bakersfield Newspaper Guild, Local 202, AFL-CIO, CLC**

**Bakersfield Newspaper Guild, Local 202, AFL-CIO, CLC, Union-Petitioner and The Bakersfield Californian.** Cases 31-UC-241, 31-UC-242, and 31-UC-243

April 14, 1995

**DECISION AND ORDER**

BY MEMBERS BROWNING, COHEN, AND  
TRUESDALE

Upon petitions filed under Section 9(b) of the National Labor Relations Act, a consolidated hearing was held on various dates in September, October, and December 1992 and January, February, and March 1993, before a designated hearing officer of the National Labor Relations Board. On July 26, 1993, pursuant to Section 102.67(h) of the Board's Rules and Regulations, the cases were transferred to the Board for decision.

The Board has delegated its authority in this proceeding to a three-member panel.

Having carefully reviewed the entire record in this proceeding, including the posthearing briefs filed by all the parties, the Board makes the following findings:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.
3. The Union is a labor organization within the meaning of Section 2(5) of the Act.
4. The Bakersfield Californian (the Employer) publishes a daily newspaper with a circulation of approximately 80,000 in the Bakersfield, California area. The parties have had a collective-bargaining relationship since at least 1959. The most recent contract between the parties expired May 27, 1992. The bargaining unit described in that agreement covers all employees of the Employer in the following departments: property management, financial, personnel, advertising sales, marketing and promotions, circulation, and editorial, excluding specifically listed positions.

In Case 31-UC-241, the Employer seeks to exclude from the unit 13 positions that it claims are confidential, managerial, or supervisory.<sup>1</sup> In Case 31-UC-242,

the Employer seeks to exclude the 17 district managers in the circulation department it claims are managerial and/or supervisory.

In Case 31-UC-243, the Union sought to have the three county correspondents accreted to the unit. At the hearing, however, the Union withdrew its contention as to the county correspondents and agreed that they were properly excluded.

**I. BACKGROUND**

The Employer is engaged in the publication and distribution of a daily newspaper, The Bakersfield Californian, in Bakersfield, California. The Employer's president and chief executive officer is Michael Fisch. The Employer's operations are divided into six divisions: advertising sales and marketing, news/editorial, circulation/operations, corporate communications, finance, and human resources. The head of each division reports directly to Fisch. The disputed employees hold various positions within the divisions.

**II. ALLEGED CONFIDENTIAL EMPLOYEES**

*A. Secretary to Retail Advertising Manager*

Retail Advertising Manager Janet Hefner is in the advertising sales and marketing division and reports to John Wells, the director of that division. Hefner's secretary is Denise Taylor. Taylor's position was created in November 1991. The Employer contends that Taylor should be excluded from the unit as a confidential employee. The Union contends she is not confidential and should be included in the unit.

Hefner supervises all personnel in the retail advertising department, represents the Employer on the bargaining committee in labor negotiations, and handles grievances up to the final stage before arbitration.

Taylor's main function is to perform typical secretarial duties. She maintains and organizes departmental files and answers the phone. She receives all the departmental mail, including Hefner's "confidential" mail, which she opens, reads, and distributes. She helps Hefner organize her day and schedules her calendar. Taylor also has access to Hefner's office and computer files.

In addition, Taylor handles confidential personnel information on bargaining unit members. She types and processes various documents including payroll information, change of status forms, disciplinary actions

<sup>1</sup>The 13 positions in dispute are: secretary to the retail advertising manager; secretary to the classified advertising manager; pagination/systems coordinator; color coordinator; capital correspondent; assistant photo director; assistant accent/features editor; three assistant news editors; and three assistant metro editors.

At the hearing the parties stipulated that the following positions should be excluded as supervisory: advertising telemarketing supervisor; classified outside sales supervisor; outside sales assist supervisor; director of advertising sales and marketing; marketing services

supervisor; major account sales supervisor; special sections editor; corporate communications director; pre-press supervisor; pre-press manager; promotions manager; accent/features editor; audiotext supervisor; business editor; graphic arts editor; news editor; photo director, metro editor; night editor; and sports editor. The parties further stipulated that the secretary to the director of advertising sales and marketing, the circulation administrative clerk, and the secretary to the corporate communications director are confidential employees and therefore excluded from the bargaining unit.

for unit members, and hiring information. As a result, Taylor may receive information before either the Union or the employee involved. For example, Taylor typed the documentation of a conversation among Hefner, another supervisor, and an employee that resulted in the employee's discharge. Taylor has access to information from human resources regarding investigations of employee disciplinary matters. Taylor also may type Hefner's notes from bargaining sessions with the Union.

In addition, Taylor is involved in the budget process for the retail advertising department. She has access to information with respect to departmental staffing needs for the coming year including the projected salaries for the employees.

The Employer contends that Taylor would not be an effective secretary to Hefner if Hefner had to isolate labor relations materials from her.

The Board's long-established test for determining whether an employee is a confidential employee is whether the employee "assist[s] and act[s] in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations." *B. F. Goodrich Co.*, 115 NLRB 722, 724 (1956). The Board's test, often referred to as the "labor nexus" test, was approved by the Supreme Court in *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170 (1981).

Although Hefner, especially by virtue of her position on the Employer's negotiating team, appears to formulate, determine, and effectuate management policies in the field of labor relations, Taylor does not assist Hefner in a confidential capacity. There is no evidence that Taylor types any contract proposals for Hefner. Instead, Taylor's assistance is limited to typing Hefner's notes of the Employer's collective-bargaining sessions with the Union, information which is already known to the Union.

Primarily, Taylor performs secretarial duties which include filing and maintaining confidential information as well as typing documents relating to discipline and grievances. In the course of her duties, Taylor may become aware of such information before it is formally presented to the employees involved or the Union. That information, however, is in the process of being forwarded to the interested parties and her mere exposure to the information does not make her a confidential employee. The Board has long held that merely having access to confidential information does not establish confidential status. *Rhode Island Hospital*, 313 NLRB 343 (1993); *Associated Day Care Services*, 269 NLRB 178 (1984). Nor does the typing of disciplinary matters, grievances, or other material relating to personnel problems render an employee confidential. *Rhode Island Hospital*, supra; *ITT Grinnell Corp.*, 212

NLRB 734 (1974). Accordingly, we find that Taylor is not a confidential employee.

#### B. Secretary to Classified Advertising Manager

Wayne Wedgeworth is the classified advertising manager. He, like Hefner, is also in the advertising sales and marketing division and reports to the director, John Wells. Wedgeworth's secretary is Patricia Bailey. The Employer contends, contrary to the Union, that Bailey is a confidential employee and therefore should be excluded from the unit.

Wedgeworth is responsible for all personnel matters in the classified advertising department. He is part of the Employer's midmanagement team involved in labor strategy and, like Hefner, is on the negotiating committee.

Bailey performs general secretarial duties for Wedgeworth and other classified advertising department supervisors and managers. She answers telephones, types, word processes, files, and prepares a monthly report on staffing revenues. She opens and distributes mail for the department including personal correspondence.

Bailey also maintains files on bargaining unit members and types and processes materials including hiring requisitions, postings, performance evaluations, payroll, change in status forms, justifications for staffing, and documents related to discipline, termination, suspension, and grievance investigation of unit members. The documents are often typed by her prior to being given to the employees, the Union, or human resources. In addition, Bailey types Wedgeworth's notes from discipline investigations, pagination committee meetings, and bargaining sessions.

Bailey also has access to Wedgeworth's office and computer files, including his files on labor relations policies and labor strategy.

Wedgeworth, like Hefner, formulates, determines, and effectuates management policies in the field of labor relations. *B. F. Goodrich Co.*, supra. Most of Bailey's duties, however, do not involve assisting Wedgeworth in a confidential capacity. Thus, Bailey, like Taylor, primarily performs typical clerical duties. Like Taylor, Bailey also has access to and processes confidential information relating to employee discipline, evaluations, and grievances. She also may become aware of information before it is given to the Union or the employee. As noted, however, that information is in the process of transmittal to the Union or the employee and mere access to that information does not make Bailey a confidential employee. *Rhode Island Hospital*, supra; *Associated Day Care*, supra.

Also like Taylor, Bailey does not act in a confidential capacity with respect to Wedgeworth's attendance at negotiations. Bailey's typing of Wedgeworth's bargaining session notes is merely to record information

the Union already knows and there is no evidence that she has advance notice of any bargaining proposals.

Bailey, however, also has access to Wedgeworth's labor strategy notes. Under *Pullman Inc.*, 214 NLRB 762 (1974), employees are confidential if they have regular access to confidential information which, if prematurely disclosed to the union, would prejudice an employer's bargaining strategy in any future negotiations. In *Pullman*, supra, employee labor estimators were found to be confidential employees because they were privy to the precise labor rates to which the employer would agree in a future collective-bargaining agreement. Although the strategy notes involved here do not reveal the exact terms the Employer would be willing to accept in any subsequent negotiations, such information is a particularly sensitive matter with respect to contract negotiations and, if revealed to the Union, could seriously impair the Employer's ability to negotiate. Accordingly, because Bailey's access to Wedgeworth's labor strategy notes would potentially give the Union an unfair advantage during future negotiations, we find that Bailey is a confidential employee and therefore exclude her from the unit.

### III. ALLEGED MANAGERS

#### A. Color Coordinator

Martha Stone-Ingalls holds the position of color coordinator. She reports to Pre-Press Manager DeWayne Gray in the corporate communications department headed by Director Bob Johnson. The Employer contends that Stone-Ingalls is a manager and thus should be excluded from the unit. The Union claims she is not managerial and therefore should remain in the unit.

Stone-Ingalls is the Employer's color specialist who is responsible for the quality of all color advertisements produced by the Employer. She examines the advertising materials submitted by the advertiser to determine whether they meet the Employer's color quality standards; if they do not, she has the authority to reject the materials and to contact the customer to see if other materials are available.

Once the material is accepted, Stone-Ingalls coordinates among the advertisers, the advertising department, advertising production, and the pressroom. She is the person to be contacted on all color advertising problems. She advises production operators as to the requirements for color separations and determines how the advertisements are to be produced to meet the needs of both the advertiser and the Employer's production department. Stone-Ingalls also reviews the press diagram to ensure that all advertisements are in their proper place.

After the prepress production is completed a color proof is pulled from the press which Stone-Ingalls checks to see that it meets the advertiser's specifications. She also examines the printed papers as they

come off the press. She has the authority to reject the printed copy and direct that an advertisement be redone. She can also "kill color" if the problem cannot be corrected and she can also stop the presses at any point in the production process. If a problem occurs at night or on weekends, she is contacted at home.

Although the Employer's advertising department has a rate card for regular advertising pricing, it does not include prices for special advertising sections or commercial printing jobs. When special requests come in, Stone-Ingalls is consulted by the advertising department for an estimate of the Employer's cost for time and materials based on such factors as the number of proofs required, the number of revisions a particular client usually wants, and how well the client meets its advertisement deadlines. In addition, Stone-Ingalls sets the charges for multicolor advertisements by considering such factors as the number of photos and the amount of ink involved. If a customer is dissatisfied with the advertisement and requests an adjustment in the bill, Stone-Ingalls will be consulted about the quality of the advertisement and whether a refund is in order. She has authorization to adjust bills for customers and vendors up to \$250.

Stone-Ingalls attends weekly meetings with the managers and supervisors, weekly production planning meetings, and monthly quality control meetings. She receives the standard managerial benefits package including paid parking.<sup>2</sup>

The Board, with Supreme Court approval, has long defined managerial employees as those who:

[F]ormulate and effectuate management policies by expressing and making operative the decisions of their employer, and those who have discretion in the performance of their jobs independent of their employer's established policy. [*General Dynamics Corp.*, 213 NLRB 851, 857 (1974).]<sup>3</sup>

The evidence does not establish that Stone-Ingalls formulates management policy or exercises discretion

<sup>2</sup> The Employer also alleges that Stone-Ingalls fills in for Pre-Press Manager Gray and Pre-Press Supervisor Farley when they are absent or otherwise not available. The Employer also asserts that Stone-Ingalls gives Farley input on employees' work performance, can authorize employees to work overtime, can call in additional help, trains production staff in color work, and makes recommendations to employees' supervisors. Both Gray and Farley were stipulated by the parties to possess statutory supervisory indicia. An employee who substitutes for a supervisor may be deemed a supervisor only if that individual's exercise of supervisory authority is both regular and substantial. *Hexacomb Corp.*, 313 NLRB 983 (1994). Here, the record shows that Stone-Ingalls' substitution is limited to such periods as vacations, appointments, or other unscheduled occasions, and thus is insufficient to establish supervisory status. *Id.* Moreover, the record evidence set forth above, does not establish, without more, that Stone-Ingalls possesses statutory supervisory authority.

<sup>3</sup> *NLRB v. Yeshiva University*, 444 U.S. 672, 682 (1980); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974), quoting *Palace Laundry Dry Cleaning*, 75 NLRB 320, 323 fn. 4 (1947).

in the performance of her job independent of the Employer's established policy. Stone-Ingalls has technical and artistic skills. However, technical or artistic expertise which may involve some discretion or judgment does not confer executive type status. See *General Dynamics Corp.*, supra at 858.

The Employer likens Stone-Ingalls to the estimators in *Aeronca, Inc.*, 221 NLRB 326, 328 (1975), and *General Dynamics Corp.*, supra at 862, and the quality assurance project administrators and senior quality assurance specialists in *General Dynamics*, supra at 862-863, who were found to be managerial employees or supervisors.

In *Aeronca*, supra, the employer manufactured component parts for aircrafts. The estimators prepared projections on the cost of performing contracts on which the employer intended to bid by considering projected profits, wage increases, and cost-of-living allowances. Those estimates were used by the employer to determine the price to quote to potential customers. The estimators also assisted in negotiating new contracts or add-on contracts with customers by participating as a member of a contracts team which also included personnel from contracts and finance and the director of pricing and estimating. Since the estimators were instrumental in setting the price of the employer's product and assisted in negotiating contracts with customers, the Board found them to be managerial employees. The differences in job duties and responsibilities between the estimators in *Aeronca*, supra, and Stone-Ingalls are substantial. Stone-Ingalls' duties are considerably less complex and more limited. Her main function is to ensure the proper color quality of a newspaper's advertisements; only incidentally does she prepare estimates, and then only for special advertising sections.

The estimators in *General Dynamics*, supra, are similarly distinguishable. In that case, the employees estimated the cost of aerospace projects for customers. Their estimates used such complex information as projected overhead, taxes, maintenance costs, employee benefits costs, and direct labor costs. The price estimators also were responsible for encoding and assembling all of the necessary information for presentation to the contracts department who then presented it to aerospace customers. This in-depth estimating is far more sophisticated and clearly involves more discretion than Stone-Ingalls' estimate of the cost of a color advertisement in a local newspaper.

The quality assurance project administrators and senior quality assurance specialists in *General Dynamics*, supra, are also distinguishable. The administrators' duties included one or more of the following: overseeing the quality assurance of the F-111 or DC-10 airplanes, negotiating budget adjustments, coordinating quality among various departments, and representing

the employer with respect to customer relations. The specialists reviewed all new contracts to ensure that engineering specifications and designs, manufacturing methods, and materials and processes would result in a product acceptable to both the employer and the customer. To this end the specialists reviewed the skills required, implemented whatever procedures in the manufacturing process that they thought were necessary, and discontinued those functions that they found superfluous. Again, these duties and responsibilities differ markedly from Stone-Ingalls' job of ensuring that color advertisements are properly priced, produced, and displayed in a daily newspaper.

Accordingly, we find that Stone-Ingalls is not a manager and that she should remain in the unit.

#### B. Systems/Pagination Coordinator

Bonnie Coats, the systems/pagination coordinator, also reports to Pre-Press Manager DeWayne Gray. The Employer argues Coats should be excluded from the unit as a manager. The Union contends that she is an employee.

Coats is the Employer's computer specialist. She is responsible for prepress computer systems hardware and software. She researches and makes recommendations on the purchase of systems hardware and software and makes sure that it is properly installed. She handles troubleshooting and has formulated a backup plan for emergency situations. She developed and implemented the prepress computer system policies. She monitors the system and can report violators. She can take down the prepress equipment if necessary. She trains employees on the computer systems. She instructs employees on the use of the DAWN computer system and holds update meetings.

Coats can purchase equipment for the prepress systems. She submits requisitions for computer equipment and her requests are invariably granted. She also can return equipment to vendors without checking with Manager Gray. Coats is authorized to make purchases in excess of the usual \$250 limit to keep the systems running in an emergency. In addition, in order to keep the systems operational, Coats has called in a service technician at hours not covered by the service contract (on weekends or after 5 p.m.), thus incurring additional costs to the Employer. She receives the standard managerial benefits package.<sup>4</sup>

Coats is on the Employer's pagination committee. At the request of the Employer, she has been evaluat-

<sup>4</sup> The Employer also contends that Coats, like Stone-Ingalls, can direct the work of employees, change work hours, require overtime, call-in additional help, and comment on employees' work performance to their supervisors. Coats also counseled an employee for unacceptable work and, after discussions with Pre-Press Manager Gray, reduced that employee's computer access. The Employer, however, does not allege, nor do we find from the evidence set forth above, that Coats is a statutory supervisor.

ing and recommending the purchase of certain systems equipment to facilitate the Employer's implementation of a new pagination process.<sup>5</sup> She interviewed candidates being considered as pagination consultants and recommended Bill Solimeno, who was eventually selected.

Coats was one of the primary authors of the proposal from the pagination committee to the CEO and board of directors. Her ideas on equipment and systems were basically adopted by the committee. The CEO then made a presentation to the board based on the committee report.

As part of her duties on the Employer's pagination committee, Coats has attended conferences, including one at which she was the Employer's only representative.

The Employer contends that Coats formulates, determines, and implements management policies by making operative decisions with respect to the prepress systems and the pagination systems, and that she has discretion in the performance of her duties independent of the Employer's established policies. We do not agree. Although Coats possesses computer and technical skills, these do not make her a manager. Coats' actions are narrowly circumscribed by company policies with rare exceptions. Her authority on the pagination committee was to recommend to an Employer-sponsored group what equipment she thought should be purchased. The group, guided by her input, prepared a report for the CEO who subsequently made a presentation to the board of directors. The decision to institute the pagination system was not made by Coats; she merely did the research.

Although Coats' responsibility for the Employer's existing computer system requires technical skill and expertise, this skill, like Stone-Ingalls', does not involve formulating policy or acting independently of the Employer's established policy. Moreover, her authority to exceed the \$250 limit is restricted to emergencies and then only to keep the system running.

The Employer analogizes Coats to the research consultants in *Washington Post*, 254 NLRB 168, 199 (1981), who were found to be managerial. In that case, the research consultants identified, defined, formulated, and evaluated long-term projects for the employer. The two researchers were part of a department whose only function was to research, investigate, and evaluate "advance systems." The Board in *Washington Post*, supra, found that the consultants developed and improved policies and procedures which impinged on the employer's business. Here, Coats' main job is to keep the Company's computers running. She is not responsible for identifying or defining which long-term projects the Employer should undertake. Instead, she is

merely a member of the pagination committee, whose authority is limited to recommending computer equipment.

The Employer also compares Coats to the senior computer systems analysts, software specialists, and industrial engineers who were found to be managerial in *Postal Service*, 210 NLRB 477 (1974). In that case the parties stipulated that the senior computer systems analysts and software specialists regularly assisted management in resolving managerial and technical problems, provided guidance to a small staff, and had more of a community of interest with the persons who formulated, determined, and oversaw employer policies than with those in the bargaining unit. The parties also agreed that the industrial engineers (who were being phased out and replaced with senior computer systems analysts) worked in the area of planning for future improvements and made recommendations for future equipment and personnel. In contrast, Coats does not regularly resolve managerial problems nor does she formulate, determine, or oversee employer policy or act independently of established policy to any meaningful degree. Rather, she is a highly skilled computer specialist who gives technical advice and services with respect to the Employer's computer system.

Accordingly, we find that Coats is not a manager and thus should remain in the unit.

### C. Capital Correspondent

The capital correspondent position was formerly held by Mike Otten, who resigned. The capital correspondent position is in the metro department which is part of the news and editorial division headed by Executive Editor Robert Bentley. Otten reported directly to Assistant Metro Editor Tim Heinrichs who reports to Metro Editor Mike Trihey. Trihey is one of several editors under Managing Editor Rick Martinez, who reports to the Executive Editor. The Employer claims that the capital correspondent position is managerial and should be excluded from the unit. The Union contends that it is a bargaining unit position.

As capital correspondent, Otten was assigned to Sacramento. He was responsible for covering Kern County<sup>6</sup> legislators serving in Sacramento and reporting on stories of interest to Kern County readers. Otten maintained an office on behalf of the paper in Sacramento. He paid the rent on the office, arranged for an intercom system to hear discussions at the capital, installed a special telephone line, and purchased a fax machine. Otten submitted monthly expense accounts sheets which were reviewed by metro editor, Trihey. Although he could commit the Employer to expenses such as rent and telephone, those expenses had been preliminary authorized by the Employer. With respect

<sup>5</sup> Pagination, in this context, is the electronic production of a newspaper.

<sup>6</sup> Bakersfield is in Kern County.

to his purchase of a fax machine, metro editor, Trihey, testified that this could have been grounds for disciplinary action because the expenditure exceeded Otten's spending limit.

Otten worked flexible hours. Although he often made his own decisions on what stories he would cover, that was true of many of the Employer's other reporters. Otten maintained regular contact with his editor in Bakersfield and was required to supply as much copy as any other reporter. Also, his stories were subject to the same editorial review as those of any other reporter. He shared common supervision and similar fringe benefits with other reporters. Although Otten had the authority to engage a freelance photographer if he decided the story warranted such treatment, rates for such photographs were standard—\$25 to \$50.

We find that the capital correspondent position is not managerial. Otten did not formulate, determine, or effectuate management policy nor did he have discretion independent of the Employer's established policies. Otten was just one of the Employer's reporters, albeit, located farther from the Employer's home office. Otten also was a reporter in whom the Employer vested more autonomy, but that did not make him a manager. He was in regular contact with his editor and subject to the same editorial policies as the other reporters. Moreover, Otten's discretion in monetary matters was limited, as evidenced by the fact that he was on a budget and that the Employer conceded that Otten could be disciplined if he exceeded his authorized amount. Accordingly, we find that the position of capital correspondent should remain in the unit.<sup>7</sup>

#### *D. District Managers*

The Employer contends that its 17 district managers are managerial and therefore should be excluded from the unit; the Union contends that the district managers are not managers and thus should remain in the unit.<sup>8</sup>

Eric Wynn, the circulation manager, oversees the circulation department which is responsible for, among other things, the home delivery of newspapers. Wynn reports to the director of circulation/operations, a position formerly held by Fred Fedesco but which became vacant during the hearing. Wynn supervises, among others, two zone supervisors. Each zone supervisor oversees a specific geographic area which is divided into some eight or more districts. Each district has a

district manager. There are also five assistant district managers who fill in for district managers when they are absent.

The district managers are in charge of service, sales, and collections. They are hourly paid employees and punch a timeclock. They generally work from 3 a.m. to 12 p.m. They normally have a break scheduled between 8 and 9 a.m., although they have some leeway on whether, and when, to take a break. They are eligible for bonuses if they increase newspaper circulation or reduce customer complaints.

District managers deliver the Employer's newspapers to its carriers. Each district manager has between 9 and 25 carriers. The district managers usually drop the carrier's papers at a predetermined drop spot.

District managers recruit and train the carriers.<sup>9</sup> After an interview with the district manager, the carrier signs a standard form "Independent Contractor Distribution Agreement."<sup>10</sup> The district managers are required to use this form and cannot alter it or negotiate its terms. Blanks on the form must be filled out as specified by the Employer. For example, the district managers write in the appropriate blank that the papers must be delivered by 6:30 a.m., weekdays or 7:30 a.m., weekends, which is the Employer's policy.<sup>11</sup> The district managers also insert the wholesale price, set by the Employer, which the carrier must pay for the papers. The suggested retail price of the papers is also set by the Employer. Carrier compensation is based on the difference between the wholesale price and the price the paper is sold to customers. The district managers have no authority to adjust either of these prices.<sup>12</sup> The contract also provides that a carrier's contract can be terminated if the carrier's number of subscribers falls more than a certain percentage. The district managers have been instructed to insert 5 percent. Similarly, the contract provides that customer complaints are to be no greater than a set standard. That standard, established by the circulation manager, is 1-1/2 complaints per thousand papers,<sup>13</sup> which figure the district manager also inserts in the form.

The carrier contracts must be signed by two employer representatives; one usually is the district manager, and the other often is the district manager's zone

<sup>9</sup>For a time, the district managers were told they must get prior authorization to hire youth carriers but that restriction has since been removed. The majority of carriers are adults.

<sup>10</sup>The parties have agreed that the carriers are independent contractors.

<sup>11</sup>On rare occasions, a district manager has required a carrier to meet an earlier delivery deadline to accommodate a particular subscriber. The district managers cannot make the delivery times later.

<sup>12</sup>The only exception is tenured carriers who, as a matter of company policy, can be "grandfathered" in under an old wholesale price.

<sup>13</sup>There was conflicting testimony about whether the district managers could impose tougher standards on the carriers. The district managers are not allowed to ease the standards.

<sup>7</sup>Although the position of capital correspondent was vacant at the time of the hearing, the position was, until recently, occupied by employee Otten. Moreover, the capital correspondent is the Employer's sole representative in Sacramento, and the Employer testified at the hearing that it intends to fill the position. In these circumstances, we find it appropriate to include this classification in the bargaining unit. See *ITT Grinnell Corp.*, 212 NLRB 734 (1974).

<sup>8</sup>The district managers have been represented by the Union since 1964.

supervisor. As a matter of regular practice, most district managers submit their contracts to their zone supervisors for signature. No zone supervisor has ever turned down a carrier contract submitted by one of their district managers.

In addition to overseeing the carriers, the district managers deal with customer complaints. When a customer complains to the circulation department, a district manager may try to resolve the problem. If the complaint is about missing or wet papers, the district manager delivers the replacement paper personally. If there are repeated complaints, a district manager may speak with the carrier, the customer, or both. When a district manager believes that a complaint is not the carrier's fault, he must ask the zone supervisor to remedy the situation.

On occasion, the Employer requires that a carrier be bonded. The district manager, however, has no authority to determine if a carrier should be bonded or the amount.<sup>14</sup>

Carriers are generally responsible for securing their own substitutes. When one cannot be found, or when there is a temporary vacancy on a route, the district manager can either deliver the route or employ a substitute. Usually the district manager will deliver the route himself or ask other district managers to help, but occasionally a substitute may be necessary. The usual rate paid to substitutes is 10 cents per paper. On late press days, however, district managers may consult the zone supervisor about whether a substitute should be used. District managers also can employ substitutes solely to make collections on a route. On these occasions, the district manager negotiates with the substitute as to how much money the substitute will receive for collecting the route. If a substitute is used, the district manager decides whether to charge the carrier for the cost of the substitute.

District managers have the discretion to extend credit to carriers. The district managers do not have a limit on the amount of credit they can extend. The zone supervisors, however, question the district managers regularly about delinquent accounts and press them until payment is made. Although a zone supervisor will usually accept a district manager's explanation of why a carrier payment has not been made, there have been occasions when a zone supervisor has stepped in. For example, one zone supervisor told one of his district managers that papers would not be provided for a carrier unless the carrier's delinquent bill was paid immediately.

Most of the Employer's promotions and incentives are developed by the zone supervisors or the sales and marketing division. However, one district manager pro-

posed a promotion called the circulation olympics which the Employer later used. District managers have authority to award carriers merchandise/food coupons worth between \$1.40 and \$9.50 for good performance. The coupons are made available to the district managers by the Employer.

District managers have the authority to both consolidate and split routes. The actual district boundaries are set by the Employer. District managers, however, may change routes within their districts. For a time, the Employer limited each route to 300 households. That policy has since been suspended, but generally each route involves between 200 and 300 papers. District managers also allow some carriers to have more than one route.

The district managers have the authority to terminate a carrier who does not meet the contract standard. For instance, if a carrier's complaints exceed the standard under the contract, the carrier's contract can be terminated. Some district managers, however, have decided not to terminate carriers for this reason.

The Employer contends that the district managers are managerial because they formulate and effectuate management policies and exercise independent discretion in the performance of their jobs. According to the Employer, the district managers manifest their managerial status by contracting with, terminating, training, and disciplining carriers, and by extending credit to carriers and splitting or consolidating carrier routes.

Case law does not support the Employer's contentions. In *Reading Eagle Co.*, 306 NLRB 871 (1992), the Board found that district managers, similar to those in this case, were not managerial. Like the district managers here, the district managers in *Reading Eagle*, supra, recruited, interviewed, employed, trained, and terminated carriers. As here, the carriers were signed without negotiations to a standard form agreement and the district manager signed the agreement as the employer's representative. The district managers also had discretion in recruiting carriers and the carriers could be employed and terminated without upper management approval. In addition, the carriers purchased their newspapers from the employer at a wholesale price and their compensation was based on the difference between the wholesale price and the price at which the paper was sold to customers. No district manager could change or adjust those prices. They could, like the district managers here, extend credit to carriers; in *Reading Eagle*, supra, the amount of credit was usually the bond limit. However, unlike *Reading Eagle*, supra, the district managers here can split or consolidate routes without higher approval.

The Board, in finding district managers not to be managerial employees in *Reading Eagle*, supra, relied on the fact that the district managers were not allowed to negotiate the terms of the carrier's contracts, had no

<sup>14</sup>In an effort to save one of his carriers some money, a district manager once waived payment of a bond fee for an intrafamily transfer of the carrier's route.

discretion or authority over the carrier's compensation, could not independently split or consolidate carrier routes, and had only limited authority to extend credit. Thus, the Board concluded that the district managers performed their duties within a narrow framework of company policy from which they had little authority to deviate. The district managers had no authority to substantially affect the economic terms of employment of the carriers.

The Board's analysis in *Reading Eagle*, supra, is equally applicable here. Although the district managers here can extend credit, that authority is not unlimited. The zone supervisors monitor delinquent accounts and have threatened to stop a carrier's papers if an account is not settled. The district managers cannot negotiate the terms of the carrier contracts nor their compensation. As a result, they have little ability to influence carrier compensation or to commit the Employer's financial resources.

Although the district managers are authorized to split and consolidate routes within their districts, the district boundaries are set by the Employer and the district managers can not change those boundaries. Moreover, although while redrawing carrier routes may make the operation more efficient, it would not appear to substantially affect the Employer economically. Thus, no matter how many routes a district is divided into, total carrier compensation remains the same and all papers must be delivered in the same time frame and at the same price. Moreover, additional customers are continually being sought irrespective of the number and size of routes. In *Eugene Register Guard*, 237 NLRB 205 (1978), where county district supervisors were found managerial in part because they could determine the number, boundaries, and length of motor routes, those determinations had a direct effect on the employer's expenses. In *Eugene Register*, supra, motor route carriers were paid on a commission basis which was determined by negotiation between the district supervisors and the carriers. The size of the commission was based on such factors as length of the route, number of subscribers, and road conditions. Here, district managers do not negotiate the carriers' compensation; it is set by the Employer. Therefore, there is no direct connection here between the district manager's route determinations and the carrier's rate of compensation and thus the Employer's expenses.

Although district managers may employ substitutes, this hiring involves little discretion or independent judgment. Normally, carriers secure their own substitutes and on late press days, the district managers check with their zone supervisors to see if a substitute is needed. Only occasionally does a district manager employ a substitute, and even then the manager does not determine the rate of compensation.

Based on the above, we find that the district managers in this case have little discretion to deviate from the Employer's established policies. They possess and exercise limited authority which is circumscribed by the use of standard forms, adherence to Employer policies, and supervision by zone supervisors. See *Washington Post*, supra, 254 NLRB 168.

Accordingly, we find that the district managers are not managers and should remain in the unit.<sup>15</sup>

#### IV. ALLEGED SUPERVISORS

The Employer claims that the following classifications should be excluded from the unit as they are supervisory under Section 2(11) of the Act.<sup>16</sup> The Union contends that these individuals are not statutory supervisors and thus should be included in the bargaining unit. In general, the Employer asserts that all of the individuals in the classifications set forth below are statutory supervisors as they possess a number of statutory indicia, i.e., the authority to hire, to suspend, to effectively recommend promotions, etc.<sup>17</sup>

##### A. Assistant Accent/Features Editor

The assistant accent/features editor, Gary Funk, is in the news and editorial division. He is under the accent/features editor and conceded supervisor, Mimi McAndrew, who reports to Managing Editor Rick Martinez.

Prior to the employment of McAndrew, Funk was the acting accent/features editor from April to August 1992. Since October 1992, he has been the assistant accent/features editor. He works Monday through Fri-

<sup>15</sup> The Employer also contends that the 17 district managers possess statutory supervisory authority as they assign work to and responsibly direct the 5 assistant district managers. The record evidence, however, does not support the Employer's contention. Instead, the evidence shows that the contact between district managers and assistants is primarily limited to instructing assistant managers on how to operate their particular district when they are on vacation or out sick. Since the district managers are merely advising the assistants as to the established practices and procedures followed in their district, we find that district managers do not exercise any independent judgment or discretion, and therefore they are not statutory supervisors.

<sup>16</sup> Sec. 2(11) defines a supervisor as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

<sup>17</sup> Except for the indicia specifically discussed with respect to each position, the Employer's contentions are only conclusory assertions without supporting facts or discussion. Thus, the Employer has failed to show that this alleged authority involves the discretion and independent judgment required by Sec. 2(11). Nor does the Employer give any examples with respect to recommendations made by these individuals, and therefore it has not demonstrated that their recommendations are effective. Accordingly, these assertions do not establish that these individuals possess any Sec. 2(11) authority.



day, 9 a.m. to 6 p.m.; McAndrew works Monday through Friday, 10 a.m. to 7 p.m. Funk assists McAndrew in the planning and production of the accent/features section of the paper. That section includes, among other things, personality profiles and reviews of restaurants, movies, and cultural events. Funk is also in charge of the teen scene section of the paper.

Generally, Funk is more involved in composing and layout whereas McAndrew primarily assigns work to the reporters and oversees their written work product. Funk shares his composing duties with unit employee, Joe Wirt, the copy editor/layout person. Although Funk is authorized to fill in for McAndrew when she is absent, McAndrew has missed virtually no work. As a result, Funk has done little substituting for McAndrew. He has attended management meetings only when McAndrew was unavailable.

As assistant accent/features editor, Funk has never hired or effectively recommended the hire or discipline of any employee. Any hiring recommendations he makes must go through McAndrew and Managing Editor Rick Martinez. McAndrew testified that as to Funk's authority for hiring and discipline, she would always have "the last word."

Funk has had only limited involvement in discipline. When Funk became aware that a reporter, Chon, whom he knew, was close to being disciplined for not making deadlines, Funk volunteered to speak with the employee. Subsequently, Funk participated in a meeting with Martinez, Employee Relations Manager Maria Payne, and McAndrew to discuss how Chon should be disciplined. Funk agreed with McAndrew's recommendation that Chon be suspended.

At the time of the hearing, McAndrew had been the accent/features editor for only a few months. Funk had been with the paper for a number of years and was the acting accent/features editor before McAndrew was hired. As a result, Funk was more familiar with certain reporters' work than McAndrew so McAndrew sought his input on employee evaluations. Funk drafted evaluations on the employees with whom McAndrew was unfamiliar. Now that McAndrew has had more time on the job, Funk has been advised that his input will continue to be sought on evaluations but that he will no longer write the evaluations. On occasion, McAndrew has also asked for Funk's input on merit increases for employees.

McAndrew usually assigns the stories to the reporters and oversees their work but there are occasions when Funk has assigned work to employees. He also has the authority to reject, delay, and "kill" stories, as well as request changes in stories. In addition, he has asked reporters to submit photographs with their stories. He has also occasionally approved requests from the accent/features writers for graphics and photo-

graphs, and assisted in scheduling photographic assignments.

Although Funk prepares the work schedule for the department, the accent/features employees work regularly scheduled hours and vacations are requested in advance. Conflicts in scheduling are resolved by seniority. The accent/features section is not generally concerned with the "late breaking" news and much of their copy can be prepared ahead resulting in very little overtime. Overtime is approved ahead of time by McAndrew except in emergencies. McAndrew could only recall one occasion when Funk approved overtime without asking her. McAndrew generally approves timecards but Funk has done it in her absence. If employees are sick or have an emergency, Funk can authorize them to leave work early.

This evidence does not establish that Funk is a statutory supervisor. The record demonstrates that McAndrew heads the department. Although Funk is authorized to fill in when McAndrew is absent, he does not substitute on a regular and substantial basis as McAndrew is rarely out of the office. See *Hexacomb*, supra, 313 NLRB 983. Moreover, Funk's scheduling of work is routine. The accent/features employees work a regular weekly schedule, their vacations are requested in advance via computer, and conflicts are resolved by seniority. Funk's approval of overtime is rare and his authority to let employees leave work is limited to sickness and emergencies and thus does not require the exercise of discretion.

Funk's involvement in employee evaluations and discipline is also limited. There is no showing that Funk's input on employee evaluations determines the employees' wages or terms and conditions of employment. As for discipline, although Funk was involved in the suspension of Chon, there were at least two layers of management above Funk who determined how employee Chon should be disciplined. Indeed, Funk merely agreed with McAndrew's recommendation that Chon be suspended.

With respect to assignment and direction of work, McAndrew usually handles the writing assignments given to reporters; Funk is more concerned with layout. Additionally, McAndrew is rarely absent from work. As a result, Funk is only occasionally required to assign work to and direct the accent/features reporters. In any event, although Funk can reject, delay, rewrite, or kill stories and request photographs to accompany articles, the Board has held that such duties are more akin to that of a working leadman, rather than a statutory supervisor, as they require the exercise of "news judgment" rather than supervisory authority. *Scranton Tribune*, 294 NLRB 692, 692-693 (1989); *Washington Post*, supra, 254 NLRB at 205.

The Employer analogizes Funk to the deputy style editors in *Washington Post*, supra at 207, who assigned

stories to the reporters. The deputy style editors, however, each had a group of reporters who reported directly to them. Also the deputy editors regularly participated in editorial conferences where decisions on the assignment and direction of the writers were made. Here, Funk has no cadre of reporters assigned to him, and he does not regularly attend management meetings.

For these reasons we find that Funk is not a supervisor and should be included in the unit.

#### *B. Assistant Photo Director*

Alan Ferguson is the assistant photo director. He reports to photo director, and conceded supervisor, Casey Christie, who reports to Managing Editor Rick Martinez in the news and editorial division.

As department head, Christie is responsible for all the photographs in the newspaper. He supervises the work of Ferguson as well as the six to eight photographers assigned to the photo department. Christie also engages freelancers, edits wire service photos, selects employee photos, performs employee evaluations, recommends discipline, and grants merit increases.

Ferguson assists Christie in running the department. In assigning duties to Ferguson, Christie told Ferguson that he wanted him to handle the finances, take care of electronics (the leaf desk), keep the department under budget, and work on next year's budget; Christie would handle the photographer assignments and personnel matters.

Ferguson shares his office with the leaf desk which reproduces Associated Press wire photos. He trains photographers on the leaf desk. He is a member of the pagination committee, he recommends equipment to be purchased by the photo department, and attends management meetings in Christie's absence. He prepares and maintains the budget for the department and can contract with freelance photographers. He spends approximately 10 percent of his time taking photographs.

Although Christie does the majority of the photo assignments, Ferguson has, at times, assigned work to photographers. Much of the work is assigned based on who is available. Other times the assignments are made because the photographer has shown an interest in the subject, has familiarity with the area, or has expertise. Christie can and has overruled Ferguson's assignment of photographers. In addition, Ferguson can determine whether photographs should be color or black and white. He can also reject photographs submitted by the photographers and has the authority to direct photographers to reshoot assignments if he finds their work unacceptable.

Ferguson fills in for Christie when he is unavailable or on vacation as well as every Monday and alternate Sundays. According to Managing Editor Rick Martinez, when Ferguson fills in, he has the same authority

as Christie. Christie testified, however, that Ferguson could not fire, hire, or make capital commitments in Christie's absence. As for other matters, the record shows that Jack Knight, a unit employee, does most of the scheduling in the department. Normally changes to the schedule are made through Christie but when Christie is unavailable, Ferguson can change the schedule, for example, by adjusting a photographer's daily assignment. And, although Christie usually acts on vacation requests, on one occasion, Ferguson approved a request in Christie's absence. On a few occasions, Ferguson has authorized employees to leave early. Ferguson is also permitted to approve overtime up to the limit set in the photo department budget. Christie has exceeded the budgetary limit but Ferguson has not.

Regarding his authority to recommend that employees be hired, Ferguson was one of several persons asked by Christie to look through the portfolio of prospective employee Ocampo (who had worked at the paper before) and Ferguson agreed with the other employees' and Christie's favorable opinion on the portfolio. Ocampo was subsequently hired. On at least one occasion, Ferguson hired a lab technician to fill in for 1 day for a regular employee who had a scheduled absence. The technician had been used before and was hired at the previous rate.

As to disciplining employees, Ferguson testified that he was told by Executive Editor Bentley during the course of the hearing that he had general authority to discipline employees in the photo department. The record shows that on one occasion, Ferguson investigated a situation where an employee complained that another employee was circulating rumors that the employee was stealing. After checking the alleged thief's office, Ferguson told the employee circulating the rumor to stop the accusations. The facts surrounding the incident were reported to Christie and Ferguson requested that Christie talk to both employees because Christie was the head of the department. According to Ferguson, he has spoken with various photographers about tardiness but has never issued them any written warnings.

After Christie has narrowed the field of likely candidates for merit increases and Golden Quill awards, a monthly employer award, he may solicit Ferguson's opinion. Christie testified that on a scale of 1 to 10, he would rate Ferguson's recommendations on employee pay increases at an 8 or 9.

We find that Ferguson is not a supervisor. Although Ferguson regularly substitutes for Christie; substitution alone is insufficient to confer supervisory status. The person substituting must also possess statutory supervisory authority while substituting. *Hexacomb*, supra. Here, the record does not establish that Ferguson possesses the requisite supervisory authority. Thus, Managing Editor Martinez' testimony that Ferguson has the

same authority as Christie is contradicted by Christie who testified that Ferguson could not fire, hire, or make capital commitments in his absence. Moreover, the activities Ferguson engages in while substituting fail to establish that he possesses supervisory authority. Thus, scheduling for the department is handled by unit employee Knight and Ferguson rarely makes changes to Knight's schedule. Ferguson's approval of vacation requests and allowing employees to leave early have occurred on only a few occasions, and therefore are insufficient to establish supervisory authority. In addition, Ferguson can only approve overtime within a strict budget, and thus does not exercise any independent judgment in this regard.

As for Bentley's statement to Ferguson during the hearing that he has the authority to discipline, it is obvious that Ferguson had not previously been aware of such authority. In fact, in the only incident discussed in the record—the theft rumor—Ferguson did not administer any discipline and reported the incident to Christie. In addition, although Ferguson has spoken to employees about tardiness he has never written one up for any infraction. Such oral reprimands do not constitute discipline that would render Ferguson a supervisor.

As to the hiring of Ocampo, Ferguson was one of several persons asked to review Ocampo's portfolio and, according to Christie, Ferguson merely "agreed" with the other favorable opinions of Ocampo's work. This does not rise to the level of making an effective recommendation. In addition, although Ferguson's input may be solicited on employee pay increases, Christie's decision on such increases is not based entirely on Ferguson's input nor are Ferguson's recommendations necessarily determinative of whether the employees receive an increase.

Nor do we find that Ferguson's assignment and direction of photographers make him a supervisor. His assignments to the photographers are generally based on the availability and interest of the photographers and thus are routine and not supervisory. Nor does the fact that he can assign photographers, reject photographs, direct reshoots, or choose whether photographs should be in color or black and white render him a supervisor. See *Washington Post*, supra at 212–213 (the photo assignment editor and night picture editor were found not to be supervisors). Moreover, much of Ferguson's time is spent monitoring the leaf desk, taking photographs, and handling the finances for the photo department.

The Employer contends that Ferguson is analogous to the photographic technician in *Newspaper Guild Local 47 (Pulitzer Publishing)*, 272 NLRB 1195, 1201 (1984), who was found to be a statutory supervisor. We disagree. The technician in that case was found supervisory primarily because he "negotiated" overtime

versus compensatory time with the employees as well as resolved employee grievances with respect to their credit lines. Ferguson has none of these duties, which were crucial to the finding of supervisory status in *Newspaper Guild Local 47*, supra. Nor do we find persuasive the Employer's claim that Ferguson is akin to the picture editor in *Washington Post*, supra at 212. In that case, the Board found that the picture editor's recommendations regarding promotions and the reorganization and restructuring of the photo department were effective. The Board also noted that the picture editor bore "major responsibility for direction" within the photo section. Here, Ferguson does not make effective recommendations and has less authority and responsibility. We find that Ferguson is not a supervisor and thus should remain in the unit.

### C. Assistant Metro Editors

There are three assistant metro editors, Alex Edillor, Tom Gordon, and Tim Heinrichs. They report to Metro Editor Mike Trihey, a conceded supervisor, who reports to Managing Editor Martinez. The metro department provides local news coverage and news of interest to Kern County readers.

Each assistant metro editor (AME) oversees a "pod" of five or six reporters. The pod system was established by the Employer in September 1992. The reporters in each pod cover a regular "beat." The AMEs assign and reassign stories to their reporters, although ideas for stories are generated by both reporters and AMEs. The AMEs also provide input to the reporters on stories from inception through the writing process. They evaluate the reporter's stories, edit, and give advice to reporters. The AMEs also ensure that the stories are fair, accurate, and balanced. Stories can be returned by the AMEs for rewriting, or the AME can "kill" the story.

The three AMEs recommended to editor Trihey that he hire Hugo Martinez-McNaught and Mark Benjamin as reporters and both applicants were subsequently hired. Trihey testified that he put "great weight" on the AME's recommendation to hire Benjamin as the night police reporter. The record also shows, however, that the reporters recommended by the AMEs were either former employees or were known personally by editor Trihey. In particular, reporter Benjamin was well known to both Martinez and Trihey as he had been submitting copy to the paper for years, had a long-term relationship with the paper, and in fact had been one of its county correspondents. On a few other occasions, the opinions of the AMEs and other employees were solicited before reporters or interns were hired.

When Trihey is preparing the evaluations of the reporters, he seeks the opinion of the reporters' AME but the AMEs do not sign the evaluations nor do they sit in when the employees are being evaluated. On one

occasion, Trihey was informed by Managing Editor Martinez that a certain amount of money for merit increases was available to divide among several reporters who were eligible for a raise. Trihey spoke with the AMEs regarding his preference and then sought their input. After some minor changes, Trihey's recommendation was given to Martinez.

The evidence that the AMEs have disciplined employees is limited to one incident when AME Gordon "counseled" the religion editor about too much socializing. This was not reduced to a written warning and Trihey testified that he would not characterize it as a verbal warning.

AME Heinrichs does the weekly scheduling for the department. The reporters, however, work regular hours and must request vacations in advance. Scheduling conflicts are resolved by seniority. Weekend shifts are rotated. AMEs have the authority to approve timecards and can authorize overtime. Trihey closely monitors overtime but the AMEs' authorization of overtime is routinely approved. When there are late breaking news stories, the AMEs have asked that the reporters work extra shifts.

The AMEs, by rotation, substitute for Trihey when he is absent. Heinrichs regularly fills in for Trihey every Friday and Saturday. According to Trihey, the AMEs possess the same authority as he does when they are substituting for him although he cited no particular incidents where they exercised such alleged supervisory authority. The AMEs also fill in for Night Editor King, an admitted supervisor. AME Edillor fills in for King on Sundays.

We do not find the AMEs to be supervisors. While the AMEs assign work to the reporters, the Board has recognized that "not all direction or involvement by editors with reporters is supervisory in nature." *Washington Post*, supra at 205. The reporters cover regular beats and are as likely to suggest a story as are the AMEs. The assignment and direction of work by AMEs is routine and based more on their "news judgment" rather than supervisory skills. *Scranton Tribune*, 294 NLRB 692 (1989); *Kenosha News Publishing Corp.*, 264 NLRB 270 fn. 3 (1980).

We find nothing in the record to show that the AMEs discipline employees. Gordon's oral counseling of the religion editor was not only an isolated incident, it was, as conceded by the Employer, not even a warning.

While it appears that at least two of the three AMEs regularly substitute for the metro and night editors, the record does not demonstrate that while substituting they possess any supervisory authority. Although Trihey testified that the AMEs possess the same authority as he does when they substitute, this authority is not defined nor has it been shown to require the use of independent judgment. Mere substitution is insuffi-

cient to confer supervisory status. *Hexacomb*, supra. We also do not find that the AMEs have hired or effectively recommended the hire of anyone. The reporters who were recommended by the AMEs were either former employees or were known personally to editor Trihey, especially, reporter Benjamin, whose suggested hiring by the AMEs was given "great weight" by Trihey. Thus, the Employer has failed to establish that the AMEs' recommendations were the basis for the reporters being hired. While their input may be sought on evaluations and merit increases, their opinions are more of an affirmation of the suggestions made by Trihey than independent assessment.

As to scheduling and overtime, although Heinrichs does the scheduling, the reporters work regular schedules, request vacations in advance, and scheduling conflicts are resolved by seniority. As a result, Heinrichs' scheduling requires little independent judgment. Additionally, as to overtime, it is routinely granted thus requiring little independent judgment on the part of the AMEs.

The Employer contends that the AMEs are analogous to the assistant metro editors in *News Journal Co.*, 227 NLRB 568 (1976). Both the assistant metro editor in *News Journal* and the AMEs here perform similar duties. The assistant metro editors in *News Journal Co.*, supra, however, were found to be supervisors by the Board based on their exercise of a number of supervisory attributes including the authority to make effective recommendations with regard to hiring and firing employees, to review and evaluate work performance, and to authorize overtime and expense vouchers. Here, the AMEs' involvement in hiring, discipline, overtime, evaluations, and scheduling does not rise to the level of statutory supervisory authority. We, therefore, find that the AMEs are not supervisors and should remain in the unit.

#### D. Assistant News Editors

The news department, under Managing Editor Martinez, is headed by Charles "Chick" Jacobs who was appointed to this position from sports editor when the former news editor, Mike McNamara, resigned during the hearing. He oversees the "A" section of the paper. He has responsibility for wire services, selection of stories, captions, and layout. He directly supervises three assistant news editors, John Furtak (also known as the copy desk chief), Joel Torczon, and Tom McAndrew.

##### 1. John Furtak

Furtak has been the assistant news editor/copy desk chief since 1992. He works with eight copy editors. As chief copy editor he reviews all the stories for the next day's paper after they have been edited by the copy editors and the headlines have been added. He checks

the stories for accuracy, content, and correct captions. He checks the dummies prepared by the wire and local desk before they are sent to the composing room. Martinez testified that Furtak also spends approximately 10 percent of his time editing copy himself.

Most of the copy edited by the copy editors is retrieved by them from a central copy basket. The copy is placed in the basket by the local and wire editors and is read in numerical page order. The copy editors are knowledgeable about what they are required to do and thus require very little instruction. The copy is usually edited in the order it is retrieved from the basket. According to Furtak, depending on the situation, including a breaking news story, he may request that the copy be read in a certain order. Some copy editors are routinely assigned certain sections of the paper to edit. For example, one copy editor edits the religion section, another the "On the Go," section, and another the "Neighbors" section. Furtak often edits the real estate section himself.

Furtak testified that his input was sought on the hiring of assistant news editor, Tom McAndrew, and that he along with McAndrew and Torczon recommended that copy editors Bryan Nolan, Jim Varley, and Laura Haywood be hired. The record shows, however, that Furtak did not interview any of these prospective hires and in fact all were already known to someone at the paper. According to the record, McNamara told Furtak that Varley, who had worked for the paper before as assistant managing editor, was available. McNamara handled the interview. Varley did not "try out" for the position and, according to Martinez, hiring Varley was easy, a "no brainer." As for Nolan, McNamara and Martinez knew Nolan's work as Nolan had worked at the paper before and McNamara told Furtak that Nolan would be ideal for the paper. Furtak did not interview Nolan nor was Nolan required to try out for the job. Haywood was seeking a part-time job. Assistant news editor, McAndrew, knew Haywood from working with her before on a paper in Fresno. McNamara and Martinez were also familiar with Haywood. Martinez told Jacobs to interview her. She was the only one to apply for the job and performed an on-the-job try out. Furtak and the other assistant news editors were asked if they thought she was doing a good job. Furtak did not interview or hire McAndrew for his job.

Furtak does not prepare formal evaluations of the copy editors; that was done by McNamara. McNamara, however, had asked Furtak for information on certain employees' performance. The Employer contends that an employee was reviewed poorly based on information that Furtak supplied to McNamara. The record, however, reflects that McNamara was independently aware that the employee was experiencing problems.

As for merit increases, copy editor Self went to Managing Editor Martinez (because there was no news

director at the time) rather than Furtak for a merit increase. On another occasion, Martinez approached Furtak and asked him if he thought that employee Denise Zapata should get a merit increase and suggested a certain amount. Furtak agreed with Martinez' recommendation and amount.

Furtak occasionally trains new copy editors but they are usually paired up with another editor. He signs timecards, can authorize overtime, and approve compensatory time. There is, however, very little overtime for copy editors. When overtime has been necessary, Furtak has often asked for volunteers. According to Furtak, he can send employees home early if they are not feeling well but cannot send them home for disciplinary reasons. Usually, the copy editors ask McNamara for the day off. If he is unavailable, they ask Furtak who grants or denies the request and then advises McNamara.

According to Furtak, he can recommend to the news editor that an employee be disciplined. Managing Editor Rick Martinez testified that, in the absence of the news editor, Furtak has the authority to suspend, discharge, or discipline. It is not clear from Furtak's testimony, however, whether he was aware that he had this alleged authority. There is no evidence that Furtak has ever exercised such authority.

During the course of the hearing, Furtak was preparing the news department's work schedule because news editor, Jacobs, had not yet assumed the news editor position. It was unclear whether Furtak would continue to do the scheduling. In any event, the copy editors work regularly scheduled hours and sign up in advance for vacations.

We find Furtak is not a supervisor. Although Furtak assigns work to and directs the copy editors, we find that this is routine and requires little independent judgment. Thus, several copy editors are always assigned the same sections of the paper to edit. For sections not assigned, copy editors merely retrieve the work to be proofed from a central basket. In addition, although Furtak's primary duty is to check the quality of the copy editors' work, he is the head copy editor, the person with the most experience in editing, and the skills he is using are more like those of a working leadman, rather than a supervisor. *Washington Post*, supra at 205.

There is no evidence that Furtak evaluates employees or effectively makes effective recommendations with respect to employee evaluations. In the one incident cited where Furtak's input was allegedly solicited and an employee evaluated poorly as a result, the record shows that the news editor was independently aware of the employee's problems.

Furtak's involvement in hiring was limited to employees who were either known to management, had worked with someone at the paper previously, had

worked at the paper previously, or were interviewed by someone other than Furtak. Thus, the record does not establish that any employee was hired on the basis of Furtak's input or recommendation.

Although Furtak had been doing the scheduling in the department while the news editor position was vacant, it is unclear whether he will continue to do so. Moreover, the copy editors work regular schedules. In addition, there is very little overtime and even then Furtak often asks for volunteers. Furtak's authority to give employees the day off is limited to those times when McNamara is unavailable. Moreover, the record does not establish that granting time off, approving compensatory time, or authorizing overtime requires the use of independent judgment.

Although Martinez testified that Furtak possessed the authority to suspend, discharge, or discipline employees when the news editor was absent, there is no showing that Furtak regularly fills in for the news editor and thus Furtak's substitution does not render him a supervisor. *Hexacomb*, supra. Moreover, there is no showing that Furtak is aware of this alleged authority. The fact that Furtak can recommend discipline also does not make him a supervisor as there is no showing that his recommendations are effective.

The Employer contends that Furtak is analogous to the deputy telegraph editor/telegraph editor in *Bulletin Co.*, 226 NLRB 345 (1976), and the deputy national editor in *Washington Post*, supra at 200, who were found to be supervisors. We do not agree. The deputy telegraph editor/telegraph editor in *Bulletin Co.*, supra, determined what copy would be offered to the news editor and assigned copy based on the complexity and importance of the story and skills of the copy editors. As a rule, the copy here is not independently assigned; instead, it is regularly given to the same employee or retrieved by the editors from a central basket. Additionally, the individuals in *Bulletin Co.*, supra, responsibly directed the telegraph desk and one of them had the authority to effectively recommend changes in the employment status of his subordinates. This is not true of Furtak. The deputy national editor in *Washington Post*, supra, had a coterie of reporters assigned to him. He also was responsible for setting the work schedule. Although Furtak has been scheduling in the absence of a news editor, it has not been shown that he will continue to schedule once Jacobs has assumed the news editor position. In any event, as discussed above, the scheduling is routine. Based on all the above, we find that Furtak is not a supervisor and should remain in the unit.

## 2. Joel Torczon

Joel Torczon is the assistant news editor/night. He helps in production of the A section of the paper. He monitors the news wire to ensure the published news

will be current and correct. He, like Furtak, oversees the work of the copy editors. He assigns page proofs, assesses the quality of the work, and can request that it be redone. He makes sure that the stories that have come in on the wire are being processed. He filled in occasionally for news editor, McNamara, on Fridays and Saturdays when McNamara was not available. As the last person to leave at night, Torczon makes the final decisions on layout and whether a late-breaking story should be included in the next day's edition of the paper.

Torczon's assignment and direction of the copy editors, like Furtak's, does not rise to the level of supervisory authority. As noted earlier, there is little assignment or direction. Generally, copy editors retrieve copy from a central basket which they edit in the order it is retrieved. Although Torczon may request that copy be redone, this routine authority, like Furtak's, is based on greater skill and experience. *Washington Post*, supra at 205.

Managing Editor Martinez testified that Torczon assigns overtime and can let employees leave early. Little overtime for copy editors, however, is available and Torczon's authority to let employees leave early is limited to emergencies and when they are sick. This does not constitute statutory supervisory authority.

Torczon, like Furtak, does not prepare employee evaluations. Instead, McNamara consulted Torczon, as he did Furtak, as to the copy editors' performance prior to writing their evaluations. There is no evidence, however, that Torczon's input had any impact on employee appraisals.

As to Torczon's alleged input in hiring employees Haywood, Nolan, and Varley, as previously discussed, Torczon, like Furtak, worked alongside part-time employee Laura Haywood and his opinion was solicited about her work. Haywood, however, was known to former news editor McNamara and Managing Editor Martinez; they told the current news editor, Jacobs, about her. Additionally, assistant news editor, McAndrew, had worked with Haywood in Fresno. Both Nolan and Varley had worked at the paper before and were known to both Martinez and McNamara.

The Employer claims that Torczon's duties are similar to those of the news editor/night in *Washington Post* case, supra, 254 NLRB at 219. In *Washington Post*, supra, however, the news editor/night clearly was involved in hiring new personnel, which is not true of Torczon. Additionally, the news editor/night regularly substituted 2 days a week for the AME in charge of the news desk. This is also not true of Torczon; he like the other assistant news editors has no regular substitution schedule but only fills in when the news editor is unavailable.

Accordingly, we find that Torczon is not a supervisor and that he should remain in the unit.

### 3. Tom McAndrew

Tom McAndrew is the assistant news editor/wire. He monitors incoming wire stories and makes the initial selection of wire stories for the paper. He makes recommendations for page 1 stories and can determine what stories need coverage by a local reporter in order to add a local angle to the story. As stories come through the wire, he will assign it to slot and put a headline on it. He shepherds the stories along to make sure that they are being prepared for the next edition of the paper. He may on occasion assign work to copy editors, though, as noted, the copy editors generally read the copy in the order it is retrieved from the basket.

According to Managing Editor Martinez, McAndrew and Furtak have the same authority. For example, Martinez testified that McAndrew can send employees home early for disciplinary reasons. However, Martinez' testimony is contradicted by the testimony of Furtak who, as noted earlier, stated that he could not send employees home for disciplinary reasons, but only for illness. Accordingly, the record does not establish McAndrew's authority in this regard. Martinez also testified that McAndrew can approve overtime if there are late-breaking stories. This testimony also does not establish supervisory authority as McAndrew's approval is limited to obvious situations. Further, the fact that McAndrew, like the other assistant news editors, filled in on Fridays and Saturdays when news editor, McNamara, was not available, also does not make him a statutory supervisor. The record does not establish that any assistant news editors, including McAndrew, regularly substitute for the news editor.

Martinez also testified that McAndrew had recommended (along with Torczon and Furtak) that Haywood, Varley, and Nolan be hired. As already noted, both McNamara and Martinez were familiar with Haywood and Martinez told Jacobs to give her a try. As to Varley and Nolan, both were known quantities as they had previously worked at the paper.

As to evaluations, according to Martinez, McNamara would seek the opinion of McAndrew (and Torczon and Furtak) as to the quality of the copy editors' work. Again, however, there is no evidence that McAndrew's opinion determined the evaluation.

The Employer analogizes McAndrew to the telegraph and deputy telegraph editors in *Bulletin Co.*, 226 NLRB 345 (1976). However, in *Bulletin*, as discussed supra, the deputy telegraph editor assigned wire copy based on his consideration of the complexity and importance of the story and the skills of the copy editor. McAndrew exercises no such independent judgment here. The copy editors know what to do. The copy is retrieved from a central basket for editing and the copy editors require very little instruction. We find that McAndrew is not a supervisor and should remain in the unit.

### ORDER

It is ordered that the existing bargaining unit is clarified to include secretary to the retail advertising manager, color coordinator, systems/pagination coordinator, capital correspondent, assistant accent/features editor, assistant photo director, assistant metro editors, assistant news editors, and the 17 district managers in the circulation department.

The unit is further clarified to exclude as a confidential employee the position of secretary to the classified advertising manager.

MEMBER BROWNING, dissenting in part.

I disagree with the majority's finding that Patricia Bailey is a confidential employee, which conclusion rests exclusively on the fact that she has "access" to Manager Wedgeworth's labor strategy notes. The evidence indicates that Bailey has access to the notes only to the extent that she has keys to the file cabinet which contains those notes and which is located in Wedgeworth's personal office. There is no evidence indicating that she typed those notes, has ever seen the notes, or that she will ever do so in the regular course of her duties. Accordingly, in my view, Bailey does not have regular access to labor relations policy information warranting her exclusion as a confidential employee.<sup>1</sup>

In all other respects, I agree with my colleagues' decision.

<sup>1</sup> *Pullman, Inc.*, 214 NLRB 762 (1974), the case relied on by the majority is, distinguishable. The employees in issue there did not merely have access to the future labor costs that would be acceptable to the employer; working with that sensitive information was an "integral feature" of their job responsibilities.